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In the Supreme Court of the United States

October Term, 1995

KENNETH D. RIGGIN, *et al., Petitioners,*

v.

OFFICE OF SENATE
FAIR EMPLOYMENT PRACTICES, *et al., Respondents.*

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

BRIEF OF RESPONDENT OFFICE OF THE U.S. SENATE SERGEANT AT ARMS IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether the Court of Appeals properly held that the Government Employee Rights Act of 1991 did not implicitly repeal the Capitol Police Retirement Act.

II.

Whether the Court of Appeals properly exercised its jurisdiction to consider and to reject Petitioners' constitutional claim.

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BRIEF OF RESPONDENT OFFICE OF THE U.S. SENATE SERGEANT AT ARMS IN OPPOSITION

Respondent Office of the United States Senate Sergeant At Arms (the "SAA") submits this brief in opposition to the Petition for Writ Of Certiorari filed by Kenneth D. Riggin and nine other retired officers of the United States Capitol Police ("USCP").

COUNTER-STATEMENT OF THE CASE

In 1990, Congress enacted the Capitol Police Retirement Act ("CPRA"), Pub. L. No. 101-428 § 2(b)(1)(A),

104 Stat. 928 (1990), which aligned the retirement system of the USCP with the retirement systems of other federal law enforcement agencies. The CPRA amended 5 U.S.C. § 8335 which, since 1974, had subjected federal law enforcement officers, other than the Capitol Police, to minimum and maximum age limits. The CPRA, as enacted in 1990, required any Capitol Police officer who was at least 55 years of age and had completed 20 years of service to retire unless the Capitol Police Board granted the officer a special exemption from automatic separation because the public interest so required.[1]

Petitioners are former Capitol Police officers on the Senate payroll who were required to retire pursuant to the mandatory retirement provisions of the CPRA. Opposing their mandatory retirement, the officers filed a charge with the Office of Senate Fair Employment Practices, in accordance with the Government Employee Rights Act of 1991 (the "GERA"), 2 U.S.C. § 1201 (1991). The GERA provides, *inter alia*, that all employment actions affecting employees of Senate offices shall be taken free from any discrimination based on age, as defined by section 15 of the Age Discrimination in Employment Act of 1967, (the "ADEA"), 29 U.S.C. § 633a. USCP officers are employees of Respondent SAA, and thus they are entitled to the protections of the GERA. In their charges, Petitioners argued that the mandatory retirement provisions of the CPRA violated the age discrimination prohibitions of the GERA. Petitioners also claimed that their mandatory retirement

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[1] The effective date of the CPRA was postponed two years; it became effective in 1992. In 1994 the CPRA was amended to raise the mandatory retirement age to 57. *See* Pub. L. No. 103-283, § 307(a), 108 Stat. 1441-42 (1994) (codified as amended at 5 U.S.C. § 8335(d)).

violated the equal protection component of the Due Process Clause of the Fifth Amendment.

Petitioners' cases were consolidated and an independent hearing board was appointed to consider their complaints in accordance with section 307(b) of the GERA, 2 U.S.C. § 1207(b). On the first day of the hearing, the hearing board granted the SAA's motion for summary judgment and dismissed the Petitioners' claims. The hearing board determined that the CPRA does not violate the GERA. Further, the board found nothing to indicate that Congress intended in 1991 to repeal by implication the mandatory retirement provisions of the CPRA, which had been enacted one year earlier.[2] (A at 37) The hearing board also found that it lacked subject matter jurisdiction of Petitioners' constitutional claim. (A at 39)

Petitioners requested review of the hearing board's decision by the Senate Select Committee on Ethics ("Ethics Committee") pursuant to section 308 of the GERA, 2 U.S.C. § 1208. The Ethics Committee affirmed the hearing board's decision, finding that "the CPRA was not repealed by and does not violate the [GERA]." (A at 28)

Thereafter, Petitioners sought review of the Ethics Committee's decision by the Court of Appeals for the Federal Circuit pursuant to section 309 of the GERA, 2 U.S.C. § 1209. In the Court of Appeals, Petitioners renewed their claim that the mandatory retirement provisions of the CPRA violated the age discrimination prohibitions of the GERA. Petitioners also contended that the hearing board had jurisdiction of Petitioners' Fifth Amendment claim, and they

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[2] "A ___" refers to the Appendix to the Petition for Writ of Certiorari in the instant case.

sought remand on that claim. Finally, Petitioners argued that the Ethics Committee violated their due process rights by not providing a detailed written opinion.

In a unanimous opinion, the Federal Circuit rejected Petitioners' arguments and affirmed the decision below. *Riggin v. Office of Senate Fair Employment Practices*, 61 F.3d 1563 (Fed. Cir. 1995). In reconciling the GERA and the CPRA, the court applied well-established rules of statutory construction and carefully reviewed the legislative history and background of the GERA and the mandatory retirement provisions of the CPRA. The court found compelling legislative evidence that the GERA should not be read to override the mandatory retirement provisions of the CPRA. Accordingly, the court held that "the CPRA and the GERA can and should be read compatibly, that Congress did not intend the GERA to repeal the CPRA, and that the petitioners are subject to the CPRA's mandatory retirement provisions." *Id.* at 1569. The court found that the SAA correctly applied the mandatory retirement provisions to the officers. The court also held that, although the hearing board had jurisdiction to consider Petitioners' equal protection claim, the failure to do so did not require remand. In rejecting Petitioners' claim and denying remand, the court found that the issue was purely a question of law within the court's jurisdiction to "decide all relevant questions of law and interpret constitutional and statutory provisions." 61 F.3d at 1571 (citing 2 U.S.C. § 1209(c)). Moreover, the court found, the issue was straightforward and did not justify remand. 61 F.3d at 1571. Finally, the court rejected Petitioners' claim that the Ethics Committee violated Petitioners' due process rights by not providing a detailed written statement of its reasons for upholding the hearing board's decision. *Id.* The court held that the opinion of the Ethics Committee satisfied the requirements imposed by the

GERA, the Ethics Committee's rules, and the Due Process Clause. *Id.*

REASONS FOR DENYING THE WRIT

I. NO COMPELLING REASON E :ISTS TO GRANT THE PETITION FOR WRIT OF CERTIORARI.

Petitioners have presented no compelling reason, as required by Rule 10 of the Supreme Court Rules, to support their Petition for Writ of Certiorari. Petitioners do not contend, nor could they, that the decision below conflicts with the decision of another United States court of appeals or with relevant decisions of this Court. *See* Sup. Ct. R. 10(a)(c).

Petitioners contend, rather, that this Court should review the decision of the Federal Circuit because it misapplied the law in this case. Petitioners also imply that the decision below involves issues of federal law that have not been, but should be, decided by this Court.

As explained below, the Federal Circuit properly applied the law in this case, consistent with relevant decisions of this Court. Also, the decision below does not raise an important issue of federal law that has not been decided by this Court. There is no reason, compelling or otherwise, to grant the Petition for Writ of Certiorari in this case.

II. THE PETITION SHOULD BE DENIED BECAUSE THE COURT OF APPEALS CORRECTLY APPLIED WELL-ESTABLISHED PRECEDENT OF THIS COURT TO FIND THAT THE GERA DID NOT IMPLICITLY REPEAL THE MANDATORY RETIREMENT PROVISIONS OF THE CPRA.

Petitioners assert that the Federal Circuit erred in finding that the mandatory retirement provisions of the CPRA do not conflict with the GERA's prohibition of age discrimination. (Petition at 7)[3] In essence, Petitioners have renewed their contention that the GERA implicitly repealed the mandatory retirement provisions of the CPRA.

The Federal Circuit correctly applied controlling precedent of this Court in determining that the GERA did not implicitly repeal the mandatory retirement provisions of the CPRA. The court first noted that a cardinal rule of statutory construction is that repeals by implication are disfavored. *See, e.g., Traynor v. Turnage*, 485 U.S. 535, 547 (1988).

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[3] "Petition ___" refers to the Petition for Writ of Certiorari. Petitioners also contend that the mandatory retirement provisions of the CPRA violate the age discrimination provisions of the Congressional Accountability Act of 1995 ("CAA"), 2 U.S.C. § 1301. (Petition at 8) However, as the Court of Appeals correctly noted, the GERA, and not the CAA, provides the exclusive remedy for age discrimination claims of Senate employees when such claims accrue before January 23, 1996, the effective date of most of the provisions of the CAA. See 2 U.S.C. §§ 1311(d), 1435(a)(1).

The court further stated that this Court has consistently held that when two statutes appear to conflict

> courts will endeavor to read them consistently and will not find a narrow statute "submerged by a later enacted statute covering a more generalized spectrum" unless the later statute "expressly contradict[s] the original act" or unless such construction "is absolutely necessary" in order for the later statute to have any meaning at all.

61 F.3d at 1566 (citing *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976)).

Relying on this precedent, the court found that the "task of reconciling" the GERA and the CPRA "is not a difficult one." *Id.* The court found that the GERA, which protects employees of Senate offices from employment discrimination in general, is more general than the mandatory retirement provisions of the CPRA, which addresses a specific issue, mandatory retirement, that applies to a limited number of employees of Senate offices. *Id.* Furthermore, the court found that the GERA and the CPRA could be easily reconciled because "the mandatory retirement provisions of the CPRA simply establish a narrow exception to the general rule, set forth in the GERA, that Senate employees are protected against age discrimination in employment." *Id.*

In so ruling, the court appropriately deferred to this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974), which provides a close analogy to this case. In *Morton*, this Court found that a specific statute, the Indian Reorganization Act, which provided employment preferences to a limited group, Native Americans, was not implicitly repealed by a

later-enacted more general statute, the Equal Employment Opportunity Act of 1972. This Court held that, "Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Id.* at 550-51.

The Federal Circuit also carefully examined the legislative background of the GERA and the CPRA and determined that Congress has clearly indicated that it has not repealed the mandatory retirement provisions of the CPRA. The court found "compelling legislative evidence" of this: Congress twice amended the CPRA's mandatory retirement provisions after the enactment of the GERA, and on numerous other occasions subsequent to the enactment of the GERA Congress considered legislation relating to the CPRA's mandatory retirement provisions or otherwise acknowledged that such provisions are still in effect.[4] *Id.* at 1568-69.

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[4] *See* Pub. L. No. 103-283, § 307, 108 Stat. 1441-42 (amendment to CPRA to increase mandatory retirement age from 55 to 57); Pub. L. No. 102-397, § 202, 106 Stat. 1949, 1951 (1992) (authorization for lump-sum payments of accrued leave for Capitol Police officers facing mandatory retirement under the CPRA); H.R. 4910, 102d Cong., 2d Sess. (1992) (legislation introduced to extend effective date of the mandatory retirement provisions of the CPRA by three years); H.R. Rep. No. 314, 103d Cong., 1st Sess. 3 (1993) (House Committee report on bill to amend the ADEA which acknowledged that the Capitol Police were subject to mandatory retirement); S. 1984, 103d Cong., 2d Sess. (1994) (Senate bill introduced to repeal the mandatory retirement provisions of the CPRA); 140 Cong. Rec. S7045 (daily ed. June 16, 1994) (request by Senator Jeffords to bar use of funds to enforce mandatory retirement of Capitol Police).

Petitioners contend that the holding of the Federal Circuit "was made in the absence of any Congressional indication" that the CPRA establishes a narrow exception to the GERA. (Petition at 7) Petitioners imply that Congress has decided that all mandatory retirement schemes for law enforcement officers are incompatible with the ADEA because Congress allowed to expire an ADEA exemption that permitted compulsory retirement of state and local law enforcement officers. *Id.* Petitioners' argument is specious for two reasons. First, it ignores the finding of the Federal Circuit that compelling legislative evidence exists of Congress's intent that the mandatory retirement provisions of the CPRA are extant and must be read consistently with the GERA. 61 F.3d at 1568-69. Second, Petitioners' contention ignores that Congress has, for nearly 50 years, enacted legislation governing the retirement rights of federal law enforcement personnel that is entirely separate and distinct from the mandatory retirement provisions applicable to nonfederal law enforcement officers. As this Court recognized in *Johnson v. Mayor of Baltimore*, 472 U.S. 353 (1985), which involved an ADEA challenge to the mandatory retirement scheme of a local government, "Congress is not always required to treat federal and nonfederal employees in the same way." *Id.* at 365 n.10.

Petitioners also contend that the Federal Circuit did not properly address the issue of whether the CPRA satisfies the bona fide occupational qualification test ("BFOQ") of the ADEA. In fact, the court addressed the issue by holding that the mandatory retirement provisions of the CPRA establish a narrow exception to the age discrimination prohibitions of the ADEA incorporated into the GERA. 61 F.3d at 1566. Relying on *Johnson*, however, Petitioners argue that this Court has found that the federal mandatory retirement scheme is not an exception to the age discrimination prohibitions of

the ADEA. (Petition at 6) Petitioners misconstrue *Johnson*. At issue in *Johnson* was whether Congress's establishment of a mandatory retirement age of 55 for federal firefighters *a fortiori* established age as a BFOQ, within the meaning of the ADEA, for non-federal firefighters. The Court found that it did not because Congress has "uncontested authority to exempt federal employees from the requirements of federal regulatory statutes," such as the ADEA. 472 U.S. at 363-70 (1985). Thus, contrary to Petitioners' assertion, the Court in *Johnson* did *not* hold that the federal mandatory retirement statute is not an exception to the age prohibitions of the ADEA.[5] Finally, the Federal Circuit explained in the instant case, "it would make no sense to hold that the mandatory retirement schemes for other law enforcement officers can co-exist with the [ADEA], while the mandatory retirement scheme for the Capitol Police cannot." 61 F.3d at 1568.

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[5] Other courts also have unanimously found that schemes mandating age restrictions for federal employees can be read compatibly with the ADEA. *Mahoney v. Trabucco*, 738 F.2d 35, 41 (1st Cir.), *cert. denied*, 469 U.S. 1036 (1984) (ADEA co-exists with mandatory retirement provisions for federal law enforcement officers); *Orzel v. Wauwatosa Fire Dep't*, 697 F.2d 743, 749 (7th Cir.), *cert. denied*, 464 U.S. 992 (1983) (same); *Palmer v. Ticcione*, 576 F.2d 459, 465 n.7 (2d Cir. 1978), *cert. denied*, 440 U.S. 945 (1979) (same); *Bowman v. United States Dep't of Justice*, 510 F. Supp. 1183, 1186 (E.D. Va.), *aff'd*, 679 F.2d 876 (4th Cir. 1981), *cert. denied*, 459 U.S. 1072 (1982) (same). *See also Stewart v. Smith*, 673 F.2d 485, 493 (D.C. Cir. 1982) (maximum hiring age limits for federal law enforcement officers are not subject to the ADEA's BFOQ test); *Francke v. United States Dep't of the Treasury*, 721 F. Supp. 47, 50 n.3 (S.D.N.Y. 1989) (same).

In summary, the Petition should be denied because the Federal Circuit correctly applied well-established precedent of this Court. Furthermore, contrary to Petitioners' assertions, this case does not present an issue unresolved by this Court in *Johnson*.

III. THE PETITION SHOULD BE DENIED BECAUSE THE COURT OF APPEALS PROPERLY EXERCISED ITS JURISDICTION TO CONSIDER AND TO REJECT PETITIONERS' CONSTITUTIONAL CLAIM.

Petitioners maintain that the Federal Circuit unnecessarily intruded on the prerogatives of Congress when it decided the merits of Petitioners' equal protection claim without letting the Ethics Committee consider the claim in the first instance. (Petition at 10) Petitioners' argument is belied by the fact that Congress expressly gave the Federal Circuit jurisdiction to "decide all relevant questions of law and interpret constitutional and statutory provisions" in reviewing GERA appeals. 2 U.S.C. § 1209(c). Furthermore, the Federal Circuit correctly stated that Petitioners' equal protection claim "is a straightforward and simple one that would not justify the time and effort involved in a remand." 61 F.3d at 1571. Because appellate courts have the authority to address such constitutional issues in the first instance, *see* 28 U.S.C. § 2106, the Federal Circuit did not err in not remanding the equal protection claim. Further, it would have been a waste of judicial and congressional resources for the court to have remanded Petitioners' constitutional claim only to have the parties return to the Federal Circuit at a later date to present an issue that the court has already decided.

Petitioners further contend that the doctrine announced by this Court in *Railroad Commission of Texas v. Pullman*,

312 U.S. 496 (1941), supports a finding that the Federal Circuit erred in ruling on Petitioners' constitutional claim rather than remanding it to the Ethics Committee. The *Pullman* abstention doctrine provides that in cases where there is an unsettled question of state law that may obviate the need to decide a federal constitutional question, a federal court should abstain until the state court has resolved the state question. *Id.* at 501-02. The doctrine reflects the desire to preserve harmonious federal-state relations by preventing an "unnecessary ruling by a federal court that is supplanted by a controlling decision of a state court." *Id.* at 500. Petitioners' attempt to invoke the *Pullman* abstention doctrine in this case is flawed in several respects. First, no authority suggests that *Pullman*-type abstention should be applied to preserve harmonious relationships between coordinate branches of the federal government rather than between federal and state courts. Second, even if *Pullman*-type abstention could be applied by analogy to coordinate branches of the federal government, the doctrine would not apply in this case. No unsettled questions of law existed for the hearing board or Ethics Committee to resolve in this case. *See City of Houston v. Hill*, 482 U.S. 451, 468 (1978) (Pullman-type abstention requires that there be "an unsettled question of state law"). As the Federal Circuit explained, no plausible basis exists for distinguishing the instant case from *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), and *Vance v. Bradley*, 440 U.S. 93 (1979), in which this Court rejected equal protection challenges to state and federal mandatory retirement statutes. 61 F.3d at 1571. Finally, this Court has emphasized that "[abstention] from the exercise of federal jurisdiction is the exception, not the rule." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). Abstention is particularly inappropriate when, as in this case, "the naked question" merely involves an issue of constitutional interpretation. *See*

Hawaii Housing Auth. v. Midkiff, 467 U.S. 229, 236 (1984). For this reason, the Federal Circuit properly held that Petitioners' equal protection claim did not justify remand. *See Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964) (*Pullman*-type abstention is not warranted when litigation has been long-delayed).

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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